Director of Lands & Surveys Sarawak v TR Subing ak Jamit Alias Langan (suing for and on behalf of himself and 25 other families (bilek) of the longhouse of RH Subing, Ulu Krian, Saratok)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–365 OF 2009
ABU SAMAH, CLEMENT SKINNER AND AZIAH ALI JJCA
11 APRIL 2013

Civil Procedure — Jurisdiction — Native Court — Whether Native Court empowered to make directions — High Court — Whether High Court had jurisdiction to grant declarations

Civil Procedure — Mode of commencement — Whether correct originating process used — Whether respondents should have applied for judicial review instead of commencing writ action

Native Customary Rights — Land dispute — Native Court, order of — Order declared boundary of respondents' native customary lands — No objection — Direction by Native Court that its order should have same effect as that of settlement order made by settlement officer — Appellant filed notice of objection to order — Respondents applied for declarations that order had same effect as settlement order — High Court judge found there was no objection as claimed by appellant — Appeal against High Court order — Whether Native Court empowered to make directions — Whether High Court judge erred in making declarations — Whether High Court had jurisdiction to grant declarations — Whether respondents should have applied for judicial review instead of commencing writ action

In early 1999, the respondents brought a case to the Saratok Native Chief's Court ('the Native Court') to determine the extent or boundary of what they claimed to be their native customary lands ('NCL'). On 30 September 1999, the Native Court gave judgment in favour of the respondents and declared the boundary or extent of the respondents' NCL ('the order of court'). Following such decision, the Registrar of the Native Court forwarded an official memorandum to the appellant enclosing, inter alia, a copy of the order of court and a notice to the appellant notifying him that if there was no written objection to the order of court, the Native Court would direct that the order be enforced as a settlement order. The memorandum had been duly received by the appellant. Since no objection had been received, the Native Court directed that its final judgment should have the same effect as that of a settlement order

made by a settlement officer under s 95 of the Sarawak Land Code ('Code') and the appellant was ordered to enforce the said judgment in accordance with ss 95(2) and (3) and 96 of the Code. On 19 December 2001, the appellant gave notice of his objection to the decision of the Native Court over the disputed land. The respondents filed a writ action whereby they sought two declarations, namely a declaration that the order of court dated 30 September 1999 was deemed to have the same effect as that of a settlement order made by a settlement officer under ss 95(2) and (3) and 96 of the Code ('Declaration No 1'), and a declaration that the appellant's objection was invalid, null and void and of no legal effect. The appellant took the stand that he had furnished an objection to the order of court to the Native Court. The High Court judge found the respondents' witnesses more credible than the appellant's witnesses and thus came to the finding of fact that there was no objection as claimed by the appellant. The High Court judge also found no merit in the appellant's contention that the respondents' writ action was an abuse of process and should be struck out because the respondents had used the wrong mode of action to enforce their rights. This was the appellant's appeal against that decision. Before this court the appellant argued that the High Court was wrong in law to grant Declaration No 1 as the High Court had acted ultra vires its powers or jurisdiction. As such, the appellant contended that the declaration sought was granted without jurisdiction and thus illegal. As for Declaration No 2, the appellant claimed that the issue as to whether the appellant had given notice within time or not was a matter to be determined by the Native Court when it issued a show cause notice to the appellant under r 11(1) of the Native Court Rules 1993. It was therefore the appellant's case that the declarations granted by the High Court were made without jurisdiction.

Held, dismissing the appeal with costs of RM30,000:

(1) The High Court in Sarawak had the jurisdiction to grant the declarations it did. As there was no evidence that the respondents in the native court proceedings were resisting or refusing to obey the order of court, the Native Court made two directions, namely that the order of court should have the same effect as that of a settlement order made by a settlement officer, and that the order be dealt with accordance with ss 95(2) and (3) and 96 of the Code ('the two directions'). These two directions were perfectly in accordance with s 22(1) of the Native Courts Ordinance 1992, as at the time when these directions were made there was no lawful impediment to the Native Court making the two directions. The Native Court was empowered to make these directions (see paras 20–26).

(2) Further, when the appellant issued and furnished to the Native Court his objection, which was well outside the time allowed, he was interested to deprive the respondents of the rights they had become entitled to. In the circumstances the filing of the respondents' writ action seeking the declarations and the granting of such declarations were not ultra vires,

illegal or made without jurisdiction. It was well within the High Court's power to grant the declarations sought (see para 27).

(3) There was no merit in the appellant' contention that Declaration No 2 was wrongly granted. Although the appellant said that the respondents should have gone back to the Native Court to ask it to determine whether the notice of objection was within time or not, instead of coming to the High Court, the facts showed that by the time the appellant issued his objection the Native Court had already issued its directions. As such, the High Court judge had not erred in making Declaration No 2 (see paras 28–29)

(4) There was no merit in the appellant's argument that the respondents should have applied for judicial review instead of commencing a writ action, which was instituted in abuse of the process of the court and ought to be struck out. It is settled law that in cases involving native customary rights, O 53 of the Rules of the High Court 1980 ('RHC') was not a suitable mode of proceeding especially when the natives sought to enforce a constitutional right by way of a declaration to that effect. Further, in the present case there was a serious disputed question of fact as to whether the appellant had furnished an objection to the order of court as he alleged. As such, clearly O 53 of the RHC was not an appropriate mode of action in this case and the respondents could not have abused the process of court in filing a writ action (see paras 31–33).

[Bahasa Malaysia summary

Pada awal tahun 1999, responden-responden memulakan kes di Mahkamah Ketua Anak Negeri Saratok ('Mahkamah Anak Negeri') untuk menentukan takat atau sempadan ke atas apa yang dituntut mereka sebagai tanah adat anak watan mereka ('TAAW'). Pada 30 September 1999, Mahkamah Anak Negeri member penghakiman menyebelahi responden-responden dan mengisytiharkan takat atau sempadan TAAW responden ('perintah mahkamah'). Berikutan keputusan itu, Pendaftar Mahkamah Anak Negeri telah mengemukakan memorandum rasmi kepada perayu dengan melampirkan, antara lain, sesalinan perintah mahkamah dan notis perayu memberitahunya bahawa jika tiada bantahan bertulis terhadap perintah mahkamah itu, Mahkamah Anak Negeri akan mengarahkan agar perintah itu dikuatkuasakan sebagai perintah penyelesaian. Memorandum itu telah pun diterima oleh perayu. Oleh kerana tiada bantahan telah diterima, Mahkamah Anak Negeri mengarahkan agar penghakiman muktamadnya hendaklah mempunyai kesan yang sama sebagaimana perintah penyelesaian yang dibuat oleh pegawai penyelesai di bawah s 95 Kanun Tanah Sarawak ('Kanun') dan perayu telah diperintahkan untuk menguatkuasakan penghakiman tersebut menurut ss 95(2) dan (3) dan 96 Kanun. Pada 19 Disember 2001, perayu telah memberi notis bantahannya terhadap keputusan Mahkamah Anak Negeri atas tanah yang dipertikaikan itu. Responden-responden telah memfailkan writ

tindakan di mana mereka memohon dua deklarasi, iaitu deklarasi agar perintah mahkamah bertarikh 30 September 1999 dianggap mempunyai kesan sama sebagaimana perintah penyelesaian yang dibuat oleh pegawai penyelesai di bawah ss 95(2) dan (3) dan 96 Kanun ('Deklarasi No 1'), dan deklarasi bahawa bantahan perayu adalah tidak sah, terbatal dan tidak berkesan. Perayu menyatakan pendirian bahawa dia telah mengemukakan bantahan terhadap perintah mahkamah itu kepada Mahkamah Anak Negeri. Hakim Mahkamah Tinggi mendapati saksi-saksi responden-responden lebih boleh dipercayai daripada saksi-saksi perayu dan oleh itu tiba kepada penemuan fakta bahawa tidak terdapat apa-apa bantahan sebagaimana didakwa oleh perayu. Hakim Mahkamah Tinggi mendapati tiada merit dalam hujah perayu bahawa writ tindakan responden-responden adalah penyalahgunaan proses dan patut dibatalkan kerana responden-responden telah menggunakan cara tindakan yang salah untuk menguatkuasakan hak-hak mereka. Ini adalah rayuan perayu terhadap keputusan tersebut. Di hadapan mahkamah ini perayu berhujah bahawa Mahkamah Tinggi adalah salah di sisi undang-undang untuk memberikan Deklarasi No 1 kerana Mahkamah Tinggi telah bertindak ultra vires atas kuasa atau bidang kuasanya. Oleh itu, perayu berhujah bahawa deklarasi itu telah diberikan tanpa bidang kuasa dan dengan itu menyalahi undang-undang. Berhubung Deklarasi No 2, perayu mendakwa bahawa isu sama ada perayu telah memberi notis dalam tempoh atau tidak adalah satu perkara untuk ditentukan oleh Mahkamah Anak Negeri apabila ia mengeluarkan notis tunjuk sebab kepada perayu di bawah k 11(1) Kaedah-Kaedah Mahkamah Anak Negeri 1993. Oleh demikian ini adalah kes perayu bahawa deklarasi-deklarasi yang diberikan oleh Mahkamah Tinggi telah dibuat tanpa bidang kuasa.

Diputuskan, menolak rayuan dengan kos RM30,000:

(1) Mahkamah Tinggi di Sarawak mempunyai bidang kuasa untuk memberikan deklarasi sebagaimana yang telah dilakukannya. Oleh kerana tiada keterangan bahawa responden-responden dalam prosiding Mahkamah Anak Negeri enggan atau membantah untuk mematuhi perintah mahkamah itu, Mahkamah Anak Negeri telah membuat dua arahan, iaitu agar perintah mahkamah itu mempunyai kesan sama sebagaimana perintah penyelesaian yang dibuat oleh pegawai penyelesai, dan bahawa perintah itu dikendalikan menurut ss 95(2) dan (3) dan (96) Kanun ('dua arahan tersebut'). Dua arahan tersebut jelas menurut s 22(1) Ordinan Mahkamah Anak Negeri 1992, kerana pada masa apabila arahan-arahan tersebut dibuat tiada halangan dari segi undang-undang terhadap Mahkamah Anak Negeri membuat dua arahan tersebut. Mahkamah Anak Negeri mempunyai kuasa untuk membuat arahan-arahan tersebut (lihat perenggan 20–26).

(2) Selanjutnya, apabila perayu mengeluar dan memberikan kepada Mahkamah Anak Negeri bantahannya, yang di luar had masa yang

dibenarkan, dia berhasrat untuk menafikan responden-responden hak-hak mereka. Dalam keadaan berikut pemfailan writ tindakan responden-responden memohon deklarasi-deklarasi tersebut dan pemberian deklarasi-deklarasi tersebut tidak ultra vires, menyalahi undang-undang atau dibuat tanpa bidang kuasa. Ia dalam kuasa Mahkamah Tinggi untuk memberikan deklarasi-deklarasi yang dipohon (lihat perenggan 27).

(3) Tiada merit dalam hujah perayu bahawa Deklarasi No 2 telah salah diberikan. Walaupun perayu menyatakan bahawa responden-responden patut merujuk balik kepada Mahkamah Anak Negeri untuk memohon ia menentukan sama ada notis bantahan adalah dalam had masa atau tidak, dan bukan kepada Mahkamah Tinggi, fakta menunjukkan bahawa pada masa perayu mengeluarkan bantahannya Mahkamah Anak Negeri telahpun mengeluarkan arahannya. Oleh itu, hakim Mahkamah Tinggi tidak terkhilaf dalam membuat Deklarasi No 2 (lihat perenggan 28–29).

(4) Tiada merit dalam hujah perayu bahawa responden-responden patut memohon semakan kehakiman dan bukan memulakan writ tindakan, yang telah dimulakan dengan menyalahgunakan proses mahkamah dan patut dibatalkan. Adalah undang-undang tetap bahawa dalam kes-kes yang melibatkan hak-hak adat anak watan, A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') bukan cara prosiding yang sesuai terutamanya apabila anak-anak watan memohon untuk dikuatkuasakan hak perlembagaan melalui deklarasi. Selanjutnya, dalam kes ini terdapat persoalan serius yang dipertikaikan berhubung fakta sama ada perayu telah mengemukakan bantahan terhadap perintah mahkamah tersebut sebagaimana dikatakannya. Oleh itu, adalah jelas A 53 KMT bukan cara tindakan yang sesuai dalam kes ini dan responden-responden tidak mungkin telah menyalah guna proses mahkamah dalam memfailkan writ tindakan (lihat perenggan 31–33).]

Notes

For a case on Native Court, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) para 5417.

For cases on whether correct originating process used, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5728–5730.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 5 CLJ 865, FC (refd)

Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal [2011] 6 MLJ 297, FC (refd)

Karpal Singh Ram Singh v Ketua Hakim Negara [2011] 4 CLJ 179, HC (refd)

Kuching Waterfront Development Sdn Bhd v Superintendent of Lands and Surveys, Kuching Division & Ors [2008] MLJU 758, HC (refd)

Manggai v Government of Sarawak & Anor [1970] 2 MLJ 41, FC (refd)
O'Reilly v Mackman [1982] 3 All ER 1124, HL (refd)
Ongkong anak Salleh v David Panggau Sandin & Anor [1983] 1 MLJ 419 (distd)
S Mariappan v Government of Malaysia [1983] 2 MLJ 340, FC (refd)
Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2009] 1 MLJ 555; [2008] 6 CLJ 235, CA (refd)
YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener) [2009] 4 MLJ 24, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(1)
Native Courts Ordinance 1992 ss 22, 22(1), 23(3)
Native Courts Rules 1993 rr 10, 11, 11(1), (3)
Rules of the High Court 1980 O 53
Sarawak Land Code (Cap 81) ss 95, 95(2), (3), 96
Specific Relief Act 1950 ss 41, 44, 45

Appeal from: Suit No 22–159 of 2002-III(I) (High Court, Kuching)

JC Fong (State Legal Counsel, Sarawak State Attorney General's Chamber) for the appellant.
See Chee How (Baru Bian) for the respondent.

Clement Skinner JCA:

[1] The Director of Lands and Surveys, Sarawak ('the appellant') appeals against the decision of the High Court, Kuching, dated 11 September 2009, granting to TR Subing ak Jamit and 25 other families of a longhouse known as Rumah Subing, Saratok, ('the respondents') two declarations in the suit they had brought against the appellant. The declarations granted were that:

(1) The said Saratok Native Court's Judgment dated 30th September, 1999 is deemed to have been duly effected by a Settlement Officer as a Settlement Order under Section 95 of the Sarawak Land Code (Cap 81) ('the Code') and enforceable in accordance with Section 95(2) and (3) and Section 96 of the Code (Declaration No.1).

(2) The Defendant's Notice of Objection dated 6th December 2001 is invalid, null and void and of no legal effect. (Declaration No.2).

THE HIGH COURT ACTION

[2] The respondents sought the above declarations by way of a writ action.

The plaintiff/respondents' case at the High Court

[3] In support of their claim for the declarations the respondents adduced evidence through the following witnesses:

(a) *Tuai Rumah* Subing ak Jamit ('PW1') who was the plaintiff;

(b) Garan ak Chunggut ('PW2') who was the *penghulu* who presided with two other assessors assisting him in Native Court Case No CC/STK/02/99(KB)(C) concerning the respondents' dispute with some six other villages over the extent of their native customary lands; and

(c) Nicholas Bawin ak Anggat ('PW3') who testified on the Iban 'Adat' and native customary rights.

[4] At the High Court it was the respondents' case that they were entitled to the declarations they sought because:

(a) they had brought a case to the Saratok Native Chief's Court in early 1999 to determine the extent or boundary of what they claimed to be their native customary lands. The defendants in that native court case were the headmen of six other longhouses;

(b) that on 30 September 1999 the Native Court, after a full hearing, gave a judgment in favour of the respondents and declared or confirmed the boundary or extent of the respondents' native customary land;

(c) there was no appeal against the judgment of the Saratok Native Court dated 30 September 1999;

(d) following such decision, the Registrar of the Saratok Native Court had on 21 August 2001 sent by AR registered post an official memorandum to the appellant enclosing the following documents for his action:

(i) Form F which is a copy of the judgment (in accordance with r 10 of the Native Courts Rules 1993);

(ii) Form F(3) which is a notice to the director of lands and surveys, informing him of the decision in the case and further notifying him that if the director does not within 21 days give to the Native Court written objection to the order (made in Form F) then the Native Court shall direct that the said order have such effect and be enforced as a settlement order; and

(iii) Nicholas Bawin ak Anggat (PW3) who testified on the Iban 'Adat' and native customary rights;

(e) the memorandum of the Registrar of the Saratok Native Court dated 21 August 2001 was duly received by the appellant on 24 August 2001. We note that this fact is expressly admitted in para 3 of the defence filed by the appellant;

(f) on 6 December 2001 the Registrar of the Saratok Native Court wrote an official memorandum to the appellant/director enclosing Form F(2) which notified the appellant that since no objection had been received therefore the Native Court acting pursuant to s 22 of the Native Courts Ordinance 1992, directed that its final judgment shall have the same

effect as that of a settlement order made by a settlement officer under s 95 of the Land Code and that the director was authorised and ordered to forthwith enforce the said judgment in accordance with ss 95(2)–(3) and 96 of the Land Code;

(g) by an official memorandum dated 19 December 2001, one Phillip T Assan, on behalf of the appellant, gave notice of his objection to the decision of the Native Court over the disputed land;

(h) it was the respondents' case at the High Court that based on the above facts the notice of objection given by Phillip T Assan on 19 December 2001 was not valid in law as it was furnished after 14 September 2001 which was the last of the 21 days to object, from the date of service of Form F(3) which the director had acknowledged receiving on 24 August 2001; and

(i) therefore the respondents claimed they were entitled to the declarations they sought.

The appellant/director's case at the High Court

[5] The appellant took the stand that he had furnished to the Native Court a notice of his objection to the making of the order of 30 September 1999. According to the appellant, when he received on 24 August 2001 the memorandum which was sent to him by the Registrar of the Saratok Native Court by AR registered post he sent to the registrar by ordinary post a memorandum dated 4 September 2001 giving notice of his objection which was allegedly signed by Philip T Assan on his behalf. Therefore the stand taken by the appellant was that there was a notice of objection dated 4 September 2001 and another dated 19 December 2001 furnished to the Registrar of the Saratok Native Court, against the decision of 30 September 1999.

[6] In support of its case the appellant called two witnesses. They were Hj Brahim bin Lampu ('DW1') who was then the current assistant director (land) at the Lands and Surveys, Sarawak but in 2001 was serving at Sri Aman, Sarawak. DW1 gave evidence to the effect that upon receiving a Form F(3) his department will issue a notice of objection within 21 days because the Lands and Surveys Department, not being a party to the judgment by the native court, requires more than 21 days to conduct investigations to determine the status of land within the area involved.

[7] The other witness for the appellant was Siti Rafeah Abdul Rahman ('DW2') who was an assistant administrative officer at the Lands and Surveys Department, having joined in June 2004. DW2 gave evidence about the

normal procedure for posting out of letters by the department. Prior to year 2003, the department practiced a 'Franking System' whereby upon franking the dispatch worker will deliver the enveloped mails to the post office for posting on the same day the mail is franked. The mail will then be deemed as posted. From the record book available to her, DW2 testified that her department collected the official memorandum dated 4 September 2001 for posting on 7 Setember 2001 and it was then recorded in a record book and posted on 8 September 2001. A copy of the relevant page of the record book was produced in evidence (p 9 of DBOD).

RELEVANT PROVISIONS OF LAW

[8] Section 22 of the Native Courts Ordinance 1992 reads as follows:

> 22(1) Where a final Order is made by a Native Court concerning any claim or dispute over native customary land to which there is no title issued by the Land Office, the court making the order may direct that such an Order shall have the same effect as that of a settlement order made by a Settlement Officer under section 95 of the Land Code and that such order be enforced or dealt with in accordance with section 95(2) and (3) and section 96 of the Land Code: Provided that no such direction shall be issued by the Court until a copy of the Order has been served on the Director of Lands and Surveys and he does not, within 21 days from the date of service of that Order, furnish written objections to the Court against the making of the direction.
>
> (2) The final order shall state the name and address of the person entitled to the land in dispute, the necessary particulars of the land and such other matters as the Native Court may deem fit to include.
>
> (3) For the purpose of this section a 'Final Order' shall mean any order made by a Native Court against which no appeal has been lodged within the period prescribed by this Ordinance or any rules made thereunder.

[9] And rr 10–11 of the Native Courts Rules 1993 reads as follows:

> 10(1)The verdict of the Native Court, including the grounds and reasons thereof, shall be given in Form F which shall be served on all parties by the Registrar.
>
> (2) Form F shall be signed by the presiding officer.
>
> (3) A copy of Form F shall be maintained in the case file and a further copy thereof transmitted to the resident within whose Division such case arises.
>
> (4) Any party aggrieved by a verdict of the Native Court may appeal against the same in accordance with part V.
>
> 11(1)Where a decision, judgment or order in Form F has been served under rule

10(1), and the person against whom the decision, judgment or order is made or given has not complied with the decision, judgment or order, the party who has obtained the decision, judgment or order may file in the Native Court a notice to show cause in Form F(1) and serve in accordance with rule 27 a copy of it on the person against whom the decision, judgment or order is made or given

(2) the Native Court after examining the person against whom the decision, judgment or order is made or given may -

(a) pursuant to section 17 of the Ordinance, allow the person time to settle any penalty or compensation payable in cash or kind by instalments as it shall think just or, in default of the payment thereof, order the sale of any of his property; or

(b) pursuant to section 19(e) of the Ordinance, order a writ of seizure and sale to be issued in Form G: Provided no order of seizure shall take effect unless and until it has been endorsed by a Magistrate; or

(c) order the Defendant to be arrested in Form T and have him committed to a court presided by a Magistrate for sentence of imprisonment in accordance with section 18(2) or 23(4) of the Ordinance.

(3) Where a decision, judgment or order has been made by a Native Court for the recovery of land or for the delivery of possession of land to which there is no title issued by the Land Office and against which no appeal has been lodged within the period of thirty (30) days from the date of receipt of Form F, the Native Court making such a decision, judgment or order shall issue a direction under section 22(1) of the Ordinance in Form F(2) to enforce such decision, judgment or order: Provided that no such direction shall be issued by the Native Court until a notice in Form F(3) has been served on the Director of Lands and Surveys and he does not within twenty-one (21) days from the date of service of the notice, furnish any written objection against the intention of the Native Court to make the direction.

(4) There shall be no appeal against any direction issued by the Native Court pursuant to section 22(1) of the Ordinance.

DECISION OF THE HIGH COURT

[10] The learned High Court judge came to a finding of fact that there was no notice of objection furnished by the appellant on 4 September 2001 as claimed by the appellant. The learned judge found that the recollection of events by the respondents' witnesses was more credible than that of the two witnesses called by the appellant. The learned High Court judge came to that finding for the following reasons:

(a) both DW1 and DW2 had no personel knowledge of the events;

(b) no reason was offered why Philip T Assan, the purported author of the notice of objection dated 4 September 2001 was not called as a witness;

(c) there was no explanation by the appellant why he had to issue the second notice of objection dated 19 December 2001, if in fact a notice of objection dated 4 September 2001 had been issued;

(d) further, there was no explanation by the appellant why he had on 19 December 2001 faxed the second notice of objection to the Native Court and did not fax the alleged first notice of objection dated 4 September 2001;

(e) there was no explanation from the appellant why Form F(2), to enforce the judgment was issued by the Saratok Native Court; the appellant could and should have called the staff of the Saratok Native Court to testify;

(f) if indeed the notice of objection dated 4 September 2001 was issued (and given DW1's evidence that the purpose behind issuing a notice of objection is to allow the department to investigate the status of the land claimed), as at the date of trial (which commenced in 2006) no action had been taken to investigate the claim, thereby giving rise to one conclusion ie there was no serious or any attempt to object to the judgment of the Saratok Native Court; and

(g) the act of the Registrar of the Saratok Native Court is an official act which the court is entitled to presume was carried out regularly unless proved otherwise, which the appellant had not done so.

[11] Another point taken in the appellant's defence at the High Court was that the respondents had used the wrong mode of action to enforce their rights. It was the contention of the appellant that since the respondents were seeking to enforce their rights under public law, they should have brought proceedings for judicial review under O 53 of the Rules of the High Court 1980 ('RHC'). In not having done so but instead commencing a writ action, it was the appellant's case that the respondents' action was an abuse of process and should be struck out.

[12] On this issue the learned judge found no merit in the appellant's contention and relied on the decision of the Federal Court in *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu(Attorney General Malaysia, intervener)* [2009] 4 MLJ 24 which the learned judge had applied in the case of *Kuching Waterfront Development Sdn Bhd v Superintendent of Lands and Surveys, Kuching Division & Ors* [2008] MLJU 758 (reported in Sarawak Court Website). The learned judge held the

respondents' action was not an abuse of process.

THIS APPEAL

[13] In his submissions the learned state legal counsel did not actually attack the seven or so reasons given by the learned judge for finding that no notice of objection had been furnished by the appellant on 4 September 2001 against the judgment of the Native Court, Saratok. Instead learned counsel pointed out that the *Pegawai Daerah*, Saratok, had on 25 November 1999 sent Form F(3) to the Pengarah, Jabatan Tanah dan Survey, Sri Aman and not to the director of lands and surveys. Counsel then submitted: 'The reasons why the Director did not raise objection (to Form F(3)) was that the Direction was apparently wrongly sent to the Superintendent's Office in Sri Amman and not to the Director who was obliged by law to enforce the Direction.'

[14] With respect, we have perused the record of appeal as well as the witness statements of all the witnesses called at the trial, but cannot find any evidence that such a reason was given by DW1 or DW2 as outlined above. We accordingly reject such reason. It is also evident to us that the notification to the director of lands and surveys which the respondents rely upon in this case is that notice in Form F(3) dated 21 August 2001 which the Registrar of the Saratok Native Court sent by AR registered post to the director and which was acknowledged by the director, lands and surveys as having been received on 24 August 2001. It was the respondents' case at the trial that the 21 days to object to such notice (under the proviso to r 11(3) of the Native Courts Rules 1993) commenced from 24 August 2001, and not the 25 November 1999. We therefore see nothing in the point taken by learned state counsel. Before us, two further points were taken for the appellant which we now address: Before we do so, we express our agreement with the reasoning of the learned judge and concur with his finding that no notice of objection had been furnished by the appellant.

(a) Whether the declaratory orders granted against the director (the appellant) was wrong in law

[15] It is the contention of the appellant that Declaratory Order No 1 granted by the High Court was clearly intended to enforce the judgment or order of the Native Court. But according to the appellant, a Native Court is given powers by the Native Courts Ordinance to enforce its own orders or judgments and ss 22(1) and ss 23(3) spells out the process and procedures relating thereto. The appellant then argued that the respondents did not approach the Native Court to compel the director to enforce the judgment of

A the Native Court as a 'Settlement Order', but instead the respondents' filed this suit in the High Court to obtain a 'declaratory order' to 'enforce' the judgment of the Native Court.

B **[16]** It was the submission of the appellant that the High Court was wrong in law to grant Declaration No 1 as the High Court had acted ultra vires the constitutional powers or civil jurisdiction of the High Court. The appellant contended that the declaration sought was granted by the High Court without jurisdiction and hence illegally. For that reason Declaration No 1 ought to be set aside. As regards Declaration No 2, the appellant contended that it related to a notice of objection issued by the appellant pursuant to s 22 of the Native Courts Ordinance, hence the question of whether the notice was given within time or not was a matter to be determined by the Native Court when the Native Court issues a show cause notice to the appellant under r 11(1) of the Native Courts Rules 1993. It was contended that as the High Court had failed to take into account the above relevant matters and facts in granting Declaration No 2, the High Court had erred, by reason whereof Declaration No 2 should be set aside.

E **[17]** The basis upon which the appellant argues the 'no jurisdiction' point is this:

(a) even though the point was not raised before the High Court, this court should nevertheless allow it to be argued on appeal as it related to the jurisdiction of the court. In support the case of *S Mariappan v Government of Malaysia* [1983] 2 MLJ 340 at p 342, was cited;

(b) under s 25(1) of the Courts of Judicature Act 1964 the High Court shall in the exercise of its jurisdiction have all the powers which was vested in it immediately prior to Malaysia Day and such other powers vested in it by any written law in force within its local jurisdiction. According to the appellant, no powers were vested in the High Court in Sarawak prior to Malaysia Day in exercise of its civil jurisdiction to enforce a judgment of a Native Court. And after Malaysia Day, according to the appellant, precedent shows that the civil courts would not grant a declaration affecting a remedy which was available in the Native Court. See the Federal Court decision in *Manggai v Government of Sarawak & Anor* [1970] 2 MLJ 41; and

(c) the Native Court in Sarawak is established under a state law to administer a system of law which differs from that administered by or in the civil courts (see *Ongkong anak Salleh v David Panggau Sandin & Anor* [1983] 1 MLJ 419 which held that the High Court does not exercise any supervisory power over a Native Court). Hence the High Court had no jurisdiction to grant a declaration to enforce a decision of a Native Court.

[18] So, according to the appellant, the declarations granted were made without jurisdiction. A

Our decision on these issues

[19] Even though this jurisdiction point was not argued in the High Court, we find that since it relates to the jurisdiction of the High Court to grant the relief sought by the respondents in this case we should allow the point to be argued. B

[20] Having done so, we do not agree with the appellant's contention that the High Court, Sarawak had no jurisdiction to grant the declarations it did. We say so for the following reasons. C

[21] The final order that was made by the Saratok Native Court on 6 December 2001 in Form F(2) reads: D

> WHEREAS at the District Native Court held on 30th day of September 1999, it was adjudged that the Claimant was entitled to possession to the land mentioned in the final Judgment or order annexed hereto AND WHEREAS the Director of Lands and Surveys had made no objection to the Court against the making of this Direction: E
>
> NOW, THEREFORE, pursuant to Section 22 of the Native Courts Ordinance 1992, it is hereby directed that the final judgment annexed hereto shall have the same effect as that of a Settlement Order made by a Settlement Officer under section 95 of the Land Code: AND these are, therefore, to authorize and order you forthwith to enforce the said judgment in accordance with section 95(2) and (3) and section 96 of the Land Code. F

[22] It is plain for us to see that this direction, was made by the Native Court under s 22(1) of the Native Courts Ordinance 1992 after the order or judgment dated 30 September 1999 had become a final order as no appeal was lodged against it by the defendants in the native court proceedings. There is no evidence that those defendants in the native court proceedings were resisting or refusing to obey the judgment of the Native Court dated 30 September 1999. Therefore, no issue arises about the respondents here needing to have recourse to the provisions of the Native Courts Ordinance or the Native Courts Rules to try to enforce the judgment dated 30 September 1999. We therefore find no merit in the argument that the respondents should have approached the Saratok Native Court to compel the director to enforce the judgment of the Native Court. G H I

[23] In relation to the notification and direction in Form F(3) which the Native Court gave to the director of lands and surveys, we find that the Saratok

Native Court was by law, expressly empowered by s 22(1) of the Native Courts Ordinance to give the direction contained in Form F(3), to give effect to its own judgment. The direction given was two-fold: (a) that the order made on 30 September 1999 shall have the same effect as that of a settlement order made by a settlement officer under s 95 of the Land Code, and (b) that such order be enforced or dealt with in accordance with ss 95(2)–(3) and 96 of the Land Code.

[24] Those were the only directions made by the Native Court and the two directions made were perfectly in accordance with s 22(1) of the Native Courts Ordinance 1992. In our judgment, at the point in time when the direction was issued ie on 6 December 2001, the Native Court would not have done so if an objection had been furnished by the director within 21 days of receiving that order on 24 August 2001. As the learned High Court judge found, the director did not furnish any such notice of objection to the Native Court, Saratok.

[25] Consequently, when the Native Court issued its direction on 6 December 2001 there was no lawful impediment to the Native Court doing so. The appellant has characterised the filing of the High Court action by the respondents to seek the two declarations which they did, as an action to 'compel' the Director to 'enforce' an order of the Native Court which, according to the appellant, the High Court is not vested with any power to do. With respect, we cannot agree with this characterisation.

[26] In our judgment what has happened here is that the appellant as well as the Saratok Native Court has followed, step by step the provisions of law in the Native Courts Ordinance and the Native Court Rules, relating to the native customary rights claimed by the appellant. And the Native Court has made certain orders and directions which it is empowered by law to make. There was no suggestion whatsoever at the High Court or before us that the Saratok Native Court had acted ultra vires its powers or jurisdiction. Therefore, resulting from the issuance of the direction by the Saratok Native Court in Form F(2) on 6 December 2001, the respondents became entitled to certain rights of a legal character or rights relating to their native customary lands which are stated by the law itself, namely:

(a) that the order made by the Native Court shall have the same effect as that of a settlement order; and

(b) that the order be enforced or dealt with in accordance with ss 95(2)–(3) and 96 of the Land Code.

[27] It is our view that when the appellant issued and furnished to the Saratok Native Court his objection on the 19 December 2001, which was well outside the time allowed under the Native Courts Ordinance and Native

Courts Rules to do so, the director was interested to deprive the respondents of the rights that they had become entitled to. In the circumstances the filing of this suit by the respondents to seek the declarations they sought and the granting of such declarations were not ultra vires, illegal or made without jurisdiction as alleged. It was well within the High Court's power to grant the declaration sought under s 41 of the Specific Relief Act 1950. The facts of this case do not show that the respondents were trying to 'enforce' a Native Court order as alleged. It is the law that directs that an order made by the Native Court shall have the same effect as a settlement order and that such order be enforced in accordance with ss 95(2)–(3) and 96 of the Land Code, if the director does not object to the Order within the time allowed. We see nothing objectionable to the High Court granting a declaration to that effect. Clearly the High Court here was not being asked to exercise any supervisory role over the Native Court. Neither was this a case concerning an appeal from the Native Court. Accordingly the decision in *Ongkong anak Salleh*'s case is distinguishable.

[28] With regard to the appellant's contention that Declaration No 2 was wrongly granted for the reasons discussed earlier, we find no merit in the contention. The appellant says that the respondents should have gone back to the Native Court to ask it to determine whether the notice of objection furnished by the director on 9 December 2001 was within time or not, instead of coming to the High Court for Declaration No 2. We do not agree.

[29] The facts show that by the time the director issued his objection on 19 December 2001, the Saratok Native Court had already issued its final order in Form F(2) containing the direction which the appellant is unhappy with. In our judgment, once the Native Court had issued its final order in Form F(2), which the Native Court would not have done in the first place if an objection had been furnished by the director, we cannot see on what basis the Native Court can be asked to do what the appellant is suggesting. The appellant said the director should be asked to show cause at the Native Court under r 11(1) of the Native Courts Rules, but r 11(1) is clearly intended to apply only to the parties at the Native Court who do not comply with the decision of the Native Court. The director of lands and surveys was not a party in the Native Court proceedings and so s 11(1) has no application to him. We accordingly find that the learned judge did not err in making Declaration No 2. Nor do we find that the learned judge had failed to take into account relevant or material matters in so granting the declaration sought.

(b) Whether the respondents should have applied for judicial review instead of commencing a writ action

[30] The appellant took this other point on the basis that the direction or

order issued by the Native Court was addressed to the Director of Lands and Surveys, Sarawak, who is a public officer and therefore, a public authority. Therefore, according to the appellant, in the context of the present dispute, the director has a duty and statutory function to administer the Land Code including ss 95–96 thereof which are referred to in the order of the Native Court. It is the appellant's case that what the respondents are seeking to do by this action is to obtain an order of mandamus to give effect to the judgment of the Native Court as a settlement order under ss 95–96 of the Land Code, which order of mandanus is available to the respondents by way judicial review proceeding, commenced under O 53 of the RHC. It is the contention of the appellant that the respondents wanted to circumvent the procedural and statutory requirements stated in O 53 of the RHC and ss 44 –45 of the Specific Relief Act 1950, for seeking an order of mandamus. Therefore, according to the appellant, this writ action was instituted in abuse of the process of the court. In support the cases of *Karpal Singh Ram Singh v Ketua Hakim Negara* [2011] 4 CLJ 179; *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555; [2008] 6 CLJ 235 (CA), were cited.

Our decision on this issue

[31] We find no merit in the point taken. We say so for the following reasons. We are of the view that the matter before the High Court involved elements of both private law and public law, in that, the issues raised at the Native Court concerned rights personal to the respondents as natives of Sarawak and their practice of such rights, which are recognised and given effect to by public authorities. In *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 at pp 172–173; [2010] 5 CLJ 865 at p 898, James Foong FCJ speaking for the Federal Court said that much depended on the facts of each case in determining whether proceedings should be commenced by way of O 53 of the RHC or writ action. His Lordship said:

> If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has a substantial public law element then the procedures under O 53 of the RHC must be adopted. Otherwise, it may be set aside on the ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O 53 of the RHC is not suitable. Aside from this, there could be other circumstances like the kind in *YAB Dato' Dr Zambry*. Much depends on the facts of the case.

[32] Reverting to the facts here, we note that at the High Court evidence was led and cross-examination conducted as to what the Iban *adat* was and whether the extent of the native customary rights claimed by the respondents had been established. These were essentially questions of fact relating to private law of

the respondents. Although the learned judge did not need to make any finding of fact on this aspect of the case, it nevertheless shows that the case did not concern public law only. In *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297 Richard Malanjum, Chief Judge, Sabah and Sarawak speaking in the Federal Court stated that in cases involving native customary rights, O 53 was not a suitable mode of proceeding especially when the natives seek to enforce a constitutional right by way of a declaration to that effect. The learned Chief Judge gave further guidance on this matter when he said that cases concerning native customary rights should be regarded as an exception to the rule in *O'Reilly v Mackman* [1982] 3 All ER 1124.

[33] Even further still on the particular facts of this case we find that there is another reason why the respondents had not abused the process of the court in filing a writ action. There was a serious dispute between the parties whether the director had in fact furnished an objection to the Native Court on 4 September 2001 as he alleges he did. This was a disputed question of fact which it was not suitable for the High Court to arrive at a finding of fact based on purely affidavit evidence. As the grounds of judgment of the learned judge shows, he decided this issue on an evaluation of both the oral and documentary evidence led before the court on the point. Clearly O 53 was not the appropriate mode of action in this case and the respondents cannot be said to have abused the process of court in filing a writ action.

[34] For all the reasons given above we dismiss this appeal with costs of RM30,000 to the respondents and affirm the decision of the High Court. Deposit to be refunded.

Appeal dismissed with costs of RM30,000.

Reported by Kohila Nesan